No. 244

In the Supreme Court of the United States

OCTOBER TERM, 1950

AMERICAN FIDELITY & CASUALTY COMPANY, INC., a corporation,
Petitioner,

VERSUS

ALL AMERICAN BUS LINES, INC., and SECURITY MUTUAL CASUALTY COMPANY, a corporation,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The petitioner at page 4 of its brief, has made a fair statement of this case. We desire, however, to add that this action from its inception, has been predicated upon the bad faith of the defendant, American, in its refusal to settle a damage case in the State Court, which had been filed against the insured, the Bus Company. Voluminous evidence was introduced in the first trial of this case in

the United States District Court for the Western District of Oklahoma (1 R. 48-103) showing the lack of preparedness of American in investigating said damage case; lack of preparedness for the trial; failure to procure any medical testimony as to the nature of the personal injury; and the refusal to settle for $5,000.00, on the morning of the trial, when it was known that this was a dangerous case. The attorney who was defending that action advised that the settlement be made, and the American, in the face of its unpreparedness refused to settle, and demanded that the trial proceed (1 R. 69).

Said damage suit in the State Court resulted in a verdict and judgment for the sum of $25,000.00. The case was thereafter compromised and settled for $17,500.00. The primary insurance company, the American, which carried the liability insurance to the extent of $10,000.00, paid the sum of $10,000.00, and the excess insurance company, the Security, which carried the liability insurance from $10,000.00 to $100,000.00, paid the balance in the sum of $7,500.00.

After the payment of said sums, this action was filed in said Federal Court against the American for the recovery of said sum of $7,500.00 which it had been compelled to pay, by reason of the bad faith of the American in its refusal to settle for the sum of $5,000.00.

In this action a jury trial was waived, and the case was tried to the Court. At the conclusion of the first trial herein, the Court found (1 R. 104):

> "In this case the company is guilty under the facts in this case of the grossest kind of negligence in the

investigation and defense of this claim. They are guilty of bad faith in not settling the claim at a time when they found they hadn't prepared for trial and they were at the Court House ready to try it."

Judgment was thereupon rendered against the American for the sum of $7,500.00, the amount sued for. Throughout this action, it has been maintained for the benefit of Security, the excess insurance company. In the first trial, however, the Bus Company was named as plaintiff. This was done on the theory that a tort action is non-assignable. Judgment was accordingly rendered in the first trial in favor of the Bus Company, and against the American for the sum of $7,500.00. The case was thereupon appealed to the Tenth Circuit, and was there reversed on the ground that the Security was the real party in interest, and therefore should have been named as plaintiff. It appears that theretofore there had been some uncertainty and some controversy in this class of cases as to who should be made party plaintiff. The Tenth Circuit, as its chief authority for such reversal, cited the recent case of *United States* v. *Aetna Casualty & Security Co. et al.*, 70 Sup. Ct. 207, 215, which held that in a case of this character, the insurer, and not the insured, is the real party in interest and must be named as plaintiff.

In accordance with said holding, on the second trial, the Security was substituted as plaintiff instead of the Bus Company. Judgment was rendered in the second trial in favor of the Security and against the American for $7,500.00, which judgment was affirmed by the Court of Appeals for the Tenth Circuit, and now reported in 190 Fed. (2d) 234.

ARGUMENT

The American now files in this Court its petition asking for a Writ of Certiorari. In our opposing brief to the brief of the petitioner, we desire to follow the same argument and in the same order presented by the petitioner.

Specification I.

In Specification I, the petitioner says that this litigation presents a question of vital public importance to the litigants, to casualty insurance companies, and to persons who purchase casualty insurance. We agree that this litigation, as well as all litigation, is important, but we do not see that this importance is any more vital than the ordinary run of litigation. It is pointed out that the insurance business is a nation-wide industry and touches persons in all walks of life. With this we also agree. But the fact that insurance business is important, does not appear to be a sufficient reason to invoke the extraordinary remedy of a Writ of Certiorari.

Specification II.

In Specification II, the petitioner says that this case involves a legal question of first impressions, and that is a case of first impressions for any court. The petitioner then argues, beginning at page 8 of its brief, that there are several reported cases holding that one insurance company cannot seek contribution from a second. This is perhaps true where the defendant company has acted in good faith, and has not been guilty of any tortious conduct. From this the petitioner argues that the decision in this case is un-

sound, and contrary to the established law. This conclusion of the petitioner appears to be based upon the supposition that it acted in good faith, whereas the evidence shows that the American did not act in good faith, but that it acted in the utmost bad faith.

Under its Specification II, the petitioner also argues that the excess insurance company, the Security, was not a party to the contract between the primary insurance company and the policy holder; that there was no privity of contract between the excess insurance company and the primary insurance carrier. From this the petitioner argues that there could be no liability in this case, because of the lack of privity. For the purpose of this argument the petitioner appears again to be assuming that the primary insurance carrier acted in good faith. On page 10 of its brief, the petitioner says: "The primary carrier in good faith declines to accept the offered settlement." This Specification II appears to be based upon the assumption of the petitioner that it acted in good faith. This is a false assumption and furthermore a question of fact, which has been judicially decided against the petitioner.

The question of good faith was one of the chief questions of fact in the trial court. We understand that a detailed statement of the evidence showing such bad faith would not be proper at this time. But the original record filed herein, shows the evidence constituting such bad faith. The findings of the trial court (1 R. 104) are to the effect that the American was guilty of bad faith. It is by reason of this negligence and bad faith that the excess insurance company, the Security, was compelled to pay to the Bus

Company, the policy holder, the sum of $7,500.00, which it would not have been called upon to pay if the primary insurance company, the American, had not exercised bad faith.

This action was brought for the purpose of recovering the $7,500.00 from the primary insurer on account of its tortious conduct, negligence and bad faith. On this matter, and in this case, the Tenth Circuit, on the first appeal held on December 28, 1949, reported in 179 Fed. (2d) 7, as follows:

> "Ordinarily when a public liability insurance company fully reimburses its insured for losses within the coverage of the policy, it becomes subrogated to the rights of the insured against third parties whose tortious conduct caused the loss."

Said decision further held that the excess insurance carrier became subrogated to the rights of the policy holder. In this connection the Court in said opinion said:

> "Under modern statutes abolishing the distinction between law and equity, and requiring that actions be brought in the name of the real party in interest, it is generally held that an insured who had been paid in full by his insurer is not the real party in interest, and is not entitled to bring an action in his own name against the third party tort feasor. Instead the action must be brought by the insurer who by virtue of subrogation becomes the only party in interest. In a very recent case involving the application of Rule 17(a) to tort claims litigation, the Supreme Court said 'if the subrogee is paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name,' citing 3 Moore, Federal Practice

(2d ed.), p. 1339. *United States* v. *Aetna Casualty & Surety Co. et al.*, 1949, 70 S. Ct. 207, 215."

The petitioner on pages 10-12 of its brief now argues that the law of subrogation has no place in this suit. In the cases cited by the petitioner on the question of subrogation, the question of bad faith was not involved, and they have no application to the case at bar. We agree that if there had been no bad faith, there would be no liability against the American, the petitioner herein.

Specification III.

In Specification III, the petitioner says that a conflict exists between the decisions of five circuits, to-wit: the Tenth Circuit, the Seventh Circuit, the Sixth Circuit, the Fifth Circuit, and the Fourth Circuit.

The above Specification III might be an important criticism, if true. But from a careful reading and analysis of all the cases cited under this specification, we submit that there is no conflict, or even inconsistency in said decisions. An analysis of the cases cited under this specification, covering the above five circuits, disclose the following:

TENTH CIRCUIT: In *American Fidelity & Casualty Co., Inc.* v. *G. A. Nichols Co.* (Tenth Circuit), 173 Fed. (2d) 830, suit was brought against G. A. Nichols Co. for damages received by a passenger on the bus of the Nichols Company. The American Fidelity and Casualty Company was the liability insurance carrier, and elected to defend the action. An offer was made to settle for the sum of $10,000.00, the amount of the insurance. The insurance company declined the offer, and judgment was recovered against the

Nichols Company for $22,360.00. While pending on appeal, the case was settled for $15,500.00. The insurance company paid $10,000.00, and the Nichols Company paid the balance of $5,500.00. The Nichols Company thereupon sued the insurance company for the recovery of the $5,500.00 paid by it, and raised the question of bad faith in refusing to make a settlement. As stated by the Court:

> "The issue of whether the Casualty Company acted in bad faith in refusing to accept the offer of settlement was submitted to the jury in the instant case by a special interrogatory and under proper instructions. The jury answered in the affirmative."

As to the law, under such conduct of bad faith, the Court stated the following:

> "When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured and if it fails so to do it acts in bad faith."

SEVENTH CIRCUIT: In *Royal Transit, Inc.* v. *Central Surety & Ins. Corporation* (Seventh Circuit), 168 Fed. (2d) 345, an action for damages was brought against the Royal

Transit, Inc., for damages for personal injury, and judgment was rendered against it for $62,500.00. The Central Surety & Ins. Corporation carried liability insurance for the Royal Transit, Inc., to the extent of $45,000.00. The Royal Transit, Inc., thereupon sued the insurance company for the difference between the amount of the judgment and the coverage of the policy, predicated upon the bad faith of the insurance company in refusing to settle the action. The trial court found that the insurance company had been guilty of bad faith, and rendered judgment against the insurance company. Upon appeal the judgment was affirmed. In its opinion the Court said:

> "In our judgment, the record discloses that his refusal to discharge this obligation was arbitrary, capricious and without any rational basis, and certainly the finding of bad faith is amply supported. As the court stated in *Traders & General Ins. Co.* v. *Rudco Oil & Gas Co.*, 10 Cir., 129 F. 2d 621, 627, 142 A. L. R. 799, with reference to a similar situation:
>
> " 'Exclusive authority to act does not necessarily mean the right to act arbitrarily. * * * The right to control the litigation in all of its aspects carries with it the correlative duty to exercise dilligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties'."

SIXTH CIRCUIT: In *Noshey et al.* v. *American Automobile Ins. Co.* (Sixth Circuit), 68 Fed. (2d) 808, the law as announced in paragraph two of the syllabus, is as follows:

> "Liability insurer, which reserved right to settle or defend suits brought against insured, may become liable to insured for entire judgment recovered against

insured, though exceeding policy amount, on theory of bad faith toward insured in settlement negotiations, but not on theory of negligence or breach of implied contract."

FIFTH CIRCUIT: In *American Mut. Liability Ins. Co. of Boston, Mass.* v. *Cooper* (Fifth Circuit), 61 Fed. (2d) 446, judgment was rendered in favor of Mrs. Auman against the plaintiff, Cooper, for the sum of $13,500.00 growing out of an automobile accident. Cooper had a $5,000.00 liability insurance policy with the defendant insurance company. At one time Mrs. Auman offered to settle for $3,000.00. This was rejected by the insurance company. Just before the case was finally submitted to the jury, Mrs. Auman's attorney agreed to settle for $4,500.00. This was also refused. The insurance company paid $5,000.00, and Cooper brought suit against the insurance company for the balance on the theory of bad faith on the part of the insurance company. Under paragraph three of the syllabus, is the following statement as to the facts:

"The evidence disclosed that the insurer failed to interview witnesses, or to make any effort to determine whether there was any liability upon the claim, and did not attempt to acquaint itself with the extent of injuries on which claim was based, and that it ignored advice of its counsel to settle the case before trial; that it rejected offer of settlement before suit, and finally rejected reasonable offer of settlement during trial, because insured would not assume a part of its own contractual liability."

As to the law of the case, the Court said:

"In our opinion the insurer cannot escape liability by acting upon what it considers to be for its own

interest alone, but it must also appear that it acted in good faith and dealt fairly with the insured. The insurer, as it had a right to do under the policy, assumed exclusive control of the claim against the insured, and took unto itself the power to determine for the insured all questions of liability, settlement, of defense and management before and during the trial, and of appeal after final judgment. We are of the opinion that this relationship imposes upon the insurer the duty, not under the terms of the contract strictly speaking, but because of and flowing from it, to act honestly and in good faith toward the insured."

The plaintiff recovered, and judgment was affirmed on appeal.

FOURTH CIRCUIT: In *American Casualty Co. of Reading, Pa.* v. *Howard et al.* (Fourth Circuit), 187 Fed. (2d) 322, the insurance company issued a liability policy in the amount of $5,000.00 to Elaine Howard covering automobile accidents. Thereafter, Elias Howard, with the permission of Elaine Howard, was driving the automobile, and collided with George Roberts, who died of the injuries thus received. The administrator of Roberts' Estate brought suit against Elias Howard for damages in the sum of $50,000.00. The insurance company defended the action, and made a thorough investigation and examination of all the facts. The attorneys for the Roberts' Estate also made a careful investigation and reached the conclusion that recovery of damages by the administrator was very doubtful. The Roberts' Estate offered to settle for $5,000.00, the amount of the insurance. This offer was declined, and a verdict and judgment was rendered for $7,000.00. The insurance company paid the $5,000.00 and Elias Howard paid the

balance of $2,000.00. Thereafter, Howard brought suit to recover the sum of $2,000.00. The trial court granted judgment for this amount, and the insurance company appealed to the Court of Appeals for the Fourth Circuit, where the case was reversed. There was no element of bad faith in this case. The trial court found and held that the insurance company had acted in good faith. We quote at length from the opinion, as follows:

> "This brings us to the final question in this case—whether American failed in its duty under the policy when it refused an offer of settlement for all liability arising from the accident upon the payment of $5,000.00. We think not.
>
> "It appears that Messrs. Haynsworth & Hanysworth, after a thorough study of the case, arrived at their approval of $4,000.00, as its settlement worth, without regard to the policy limits and with no thought of placing the selfish interests of American above the interests of the assured. In the light of the demands of Mr. Leatherwood, on behalf of Howard, for a complete settlement at the figure of $5,000.00, Haynsworth submitted their entire file (omitting their own opinion and recommendations) to Ben C. Thornton, a lawyer of unquestioned competence and experience. The opinion of Thornton coincided with that of Haynsworth & Hanysworth. At the trial of the instant case, Mr. Stephen Nettles, another competent lawyer, with wide experience in personal injury cases, testified that if he had been handling the case, he would have taken the same position in the settlement negotiations as that taken by Haynsworth & Hanysworth. Pinkney Cain, another competent and experienced lawyer, was present in the court-room, ready to testify as to his opinion of the manner in which the settlement negotiations were conducted. Other members of the bar

of Greenville were on call to give their opinions. Cain was excused and these other lawyers were notified not to appear when the District Judge stated: 'I am not going to handle this case on the basis or condition of whether we have reputable attorneys and whether they acted with reasonable prudence or not.' It is apparent that these lawyers would have corroborated the testimony of Stephens Nettles.

"No countervailing evidence of this type was introduced on behalf of Elias Howard, whose counsel seemed to rely, as did the District Court, on the proposition that the facts and circumstances of the accident which resulted in the death of Roberts in themselves warrant the conclusion that American was negligent in not accepting the settlement of $5,000.00. With that we cannot agree. A fair gauge or standard by which the conduct of Messer. Haynsworth and Haynsworth in the settlement negotiations here involved, can be appraised, prospective as that conduct had to be in contemplation of the possibilities and probabilities of the outcome of the litigation, would seem to be the judgment of other reasonable and competent lawyers who by experience were familiar with local law and local jury verdict in cases similar to the one in question."

It is thus seen that in the above case in the Fourth Circuit, there was no proof and no showing of bad faith. The insurance company introduced proof that it had conducted the litigation in a proper and careful manner, and with good faith. This proof was made by a number of reputable attorneys. No proof of bad faith was even offered, and as stated by the Court: "No countervailing evidence of this type was introduced on behalf of Elias Howard * * *."

From a careful examination of all the cases cited by the petitioner, in its attempt to show that there is a conflict between the decisions of the various circuits, we are unable to see an conflict whatsoever. We believe that there is a unanimity among the various circuits on the question of bad faith; and that the well-recognized law on this subject is well expressed in the case of *American Fidelity & Casualty Co.* v. *G. A. Nichols Co.*, 173 Fed. (2d) 830, in the following language:

> "When a liability insurance company by the terms of its policy obtains from the insured a power, irrevocable during the continuance of its liability under the policy, to determine whether an offer of compromise of a claim shall be accepted or rejected, it creates a fiduciary relationship between it and the insured with the resulting duties that grow out of such relationship. Under policies like those here involved, the insurer and the insured owe to each other the duty to exercise the utmost good faith. While the insurance company, in determining whether to accept or reject an offer of compromise, may give proper consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured and if it fails so to do it acts in bad faith."

Specification IV.

In Specification IV, the petitioner says that its constitutional right to a trial by jury was denied, and relied upon Rule 38. The answer to this specification is that its right to trial by jury was waived under said Rule 38(d), which provides that if a written demand is not made within 10 days after service, this constitutes a waiver of trial by

jury. When this case was filed a jury was waived, and the case proceeded to trial and judgment without any demand for a jury trial. It was not until after the case was remanded from the Tenth Circuit, and at the time the Security was substituted as plaintiff, that the American filed its demand for a jury trial (2 R. 3). No new issue was raised by said substitution. It was the same identical case, with the same identical issues. All of the proceedings relating to the second trial relate back to the original inception of this action.

The reasons for denying this demand for a jury trial, coming at the late date it did, is well stated in the second opinion of the Tenth Circuit (190 Fed. [2d] 234) as follows:

> "Complaint is made that the court denied the demand of American for a jury trial. It is said that in its answer to the complaint as amended and supplemented by the order substituting Security as the party plaintiff, American set up a great number of defenses which involved issues of fact, for instance the question of good faith or bad faith in the rejection of the offer of settlement of the case pending in the state court; and that as between Security and American, the latter was entitled to a jury trial of such issues. Under Rule of Civil Procedure 38, the right of jury trial of an issue is waived unless a demand for it is made not later than ten days after service of the last pleading relating to such issue. American was the defendant in the action from its beginning. The issue of bad faith on its part in rejecting the offer of settlement of the action pending in the state court was squarely joined on the face of the original complaint and the original answer. No demand was made for a jury trial of that issue within ten days after the filing of the answer, and it was fully tried to the court with-

out a jury. The substitution of Security as the party plaintiff did not change in any manner that issue. Neither did it change in any substantial respect any other issue of fact in the case. American had effectively waived its right to a jury trial. And the substitution of Security as the party plaintiff, without injecting into the case any new or different issues of fact, did not create in American a new right to demand a jury trial. Neither did it revive such right. Even though in such circumstances the court had the power in its discretion to grant a jury trial, the denial of the demand of American did not constitute reversible error. *Roth* v. *Hyer*, 5 Cir., 142 F. 2d 227, certiorari denied, 323 U. S. 712, 65 S. Ct. 38, 89 L. Ed. 573."

Above cited case of *Roth* v. *Hyer*, also stated:

"By Rule 38(b) and (d) the right of jury trial of an issue is waived unless a demand for it is made not later than ten days after the service of the last pleading directed to such issue. We do not think the right to make demand is revived by the reversal of a case for a new trial, nor by a belated amendment of pleadings touching the same general issues. We accordingly hold that there was no error on the retrial in refusing the demand for a jury trial."

CONCLUSION

In conclusion, we submit that this litigation has an importance similar to that of most litigation, but that there is nothing in this case which makes it of any peculiar importance which would justify the extraordinary remedy of a Writ of Certiorari. We further submit that this case is not one of first impression, but that the legal principles herein involved are well settled by uniform precedents.

We further submit that there is no conflict between the various Circuits or Courts of Appeal, on the question of good faith. Finally we submit that the American had waived its right to a trial by jury, and that it was therefor not entitled to its belated demand for a jury trial.

We therefore pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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September, 1951.

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CLERK

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MOTION

For Permission to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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MOTION

For Permission to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari.

The undersigned Members of the Bar of this Court, the consent of attorneys representing the Respondents having been declined, request permission of this Court to file briefs in support of the Petition for Writ of Certiorari of Petitioner and represent and show to the Court:

(1) The legal questions presented are of first impression and are of vital public concern to all casualty

insurance companies and every purchaser of casualty insurance.

(2) There is a conflict between the decisions of the various Circuits.

(3) The undersigned attorneys represent a great number of casualty insurance companies.

(4) Because of a nation wide effect of a decision of the Circuit Court it is important for the Court to have the benefit of the composite views of attorneys residing at various points throughout the United States.

WHEREFORE, the undersigned Members of the Bar of this Court respectfully request permission of this Court to file briefs amicus curiae in support of the petition for Writ of Certiorari.

Respectfully submitted,

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I, Rodman W. Keenon, a Member of the Bar of the Supreme Court of the United States, residing at 602 Bank of Commerce Building, Lexington, Kentucky, desire that my name be signed to the above motion and the brief amicus curiae in event permission is granted to file amicus curiae brief, and authorize the signing of my name both to the above motion and the brief amicus curiae after said documents have been printed and are ready for filing.

.....
RODMAN W. KEENON.